No. 14581

United States
Court of Appeals
For the Ninth Circuit.

CLIFFORD G. MARTIN, Doing Business as Martin Music Company,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-28-55

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

Civil No. 6616

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIFFORD G. MARTIN, dba MARTIN MUSIC COMPANY,

Defendant.

AMENDED COMPLAINT

Plaintiff, by leave of Court first had and obtained, files this its amended complaint, and alleges:

I.

This is a civil action brought to recover damages for violation by Defendant of Ceiling Price Regulation No. 34 (16 F.R. 4446, as amended, issued pursuant to the Defense Production Act of 1950, (Public Law 69, 82nd Congress, 64 Stat. 798, Public Law 96, 82nd Congress), as amended, and for an injunction or other order restraining the Defendant from further violations. Jurisdiction of the suit is vested in this Court by Section 798(b) of the Defense Production Act of 1950, as amended, and also by Section 1345, Title 28, U. S. Code.

II.

Section 409(a) of the Defense Production Act of 1950, as amended, provide as follows:

"Whenever in the judgment of the President any

person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 405 of this title, he may make application to any district court of the United States or any United States court of any territory or other place subject to the jurisdiction of the United States for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the President that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond."

Section 409(c) of the Defense Production Act of 1950, as amended, provides as follows:

"If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or service for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater; (1) such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as

the court in its discretion may determine, or, (2) an amount not less than $25.00 nor more than $50.00 as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation or order in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the word "overcharge" shall mean the amount by which the consideration exceeds the applicable ceiling. If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the President may institute such action on behalf of the United States within such one-year period, or compromise with the seller the liability which might be assessed against the seller in such an action."

III.

Ceiling Price Regulation No. 34, aforesaid, effective May 16, 1951, was issued by the Director of Price Stabilization pursuant to the aforesaid Defense Production Act of 1950, as amended, Executive Order 10161 (15 F.R. 6105) and Economic Stabilization Agency Order No. 2 (16 F.R. 738). This regulation fixed the ceiling price for services including the furnishing of music by a means of

coin operated machines and was in full force and effect at all times during the period of one year prior to the filing.

IV.

Defendant is an individual doing business under the assumed name of Martin Music Company in the State of Oregon and in the State of California with his principal offices in the City of Grants Pass, in the County of Josephine and the State of Oregon, within the District of Oregon and the jurisdiction of this Court, and was and is engaged in the furnishing of music by means of coin operated machines to purchasers in said states and district.

V.

Under said Ceiling Price Regulation 34, Defendant's ceiling prices for the sale of such services, the furnishing of music by means of coin operated machines, was the highest price charged for such services during the base period from December 19, 1950, to January 25, 1951, inclusive, to purchasers of the same class, and Defendant's ceiling price was fixed by said regulation in the sum of five cents for the playing of each record in such coin operated machines.

VI.

Defendant during the period from September 3, 1951, to the date of the filing of this suit sold such services at a price of ten cents and three for twenty-five cents for the playing of records in coin operated machines located in various establishments in

the States of Oregon and California, and charged and received prices for the same over the lawful ceiling price aforesaid in the total amount of $22,-841.25.

VII.

All of the transactions described herein occurred within one year of the filing of the Complaint in this cause.

VIII.

All of the transactions described herein were other than in the course of purchaser's trade or business, and thirty days have elapsed since the occurrence of a greater portion of the violations described herein and no suit for damages has been filed by any purchaser.

IX.

None of the transactions complained of herein arose because Defendant acted upon and in accordance with the written advice and instructions of the President of the United States or any official or employee authorized to act for him.

X.

None of the transactions described herein arose out of the sale of any material or service to any agency of the Government pursuant to the lowest bid made in response to an invitation for competitive bids.

XI.

The overcharges aforesaid were willful and were the result of failure to take practicable precaution against the occurrence of violations.

XII.

The violations are of a continuing nature and the Defendant was, and is, charging such prices in excess of ceilings at the date of the filing of this suit although he has been repeatedly warned to reduce such prices and Defendant will continue to violate the act and the regulation unless he is restrained by this Court.

XIII.

The United States brings this action in its sovereign capacity to accomplish the purposes of the Defense Production Act of 1950, as amended, by enforcing necesary price controls designated to protect the national economy against future loss of needed purchasing power and to prevent a future collapse of values. Unless Defendant and all persons in active concert or participation with Defendant are enjoined from further selling and delivering services at prices in excess of applicable ceilings established by the regulation, the United States of America, Plaintiff herein, will suffer immediate and irreparable injury for which it has no adequate remedy at law.

Wherefore, Plaintiff, the United States of America, prays:

1. That this Court, pending the final determination of this cause, issue a preliminary injunction restraining and enjoining Defendant, his agents, servants, employees and all other persons in active concert or participation with Defendant and each

of them from directly or indirectly selling or offering, soliciting or agreeing to sell, services in the furnishing of music by coin operated machines at prices in excess of the applicable maximum prices fixed by the ceiling price regulations as heretofore or hereafter amended, or under any price stabilization regulation hereafter issued which establishes maximum prices for such services.

2. That this Court, upon final determination of this cause, issue a permanent injunction restraining and enjoining Defendant, his agents, servants, employees and all persons in active concert or participation with Defendant, and each of them, in the manner and form aforesaid.

3. That Plaintiff be given judgment against Defendant in the sum of $68,523.75, together with reasonable attorney fees and costs.

4. That this Court grant such other, further and different relief as may be just and equitable.

HENRY L. HESS,
United States Attorney.

/s/ ASHLEY GREENE,
Special Assistant United
States Attorney.

[Endorsed]: Filed December 1, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT ON GROUND THAT COMPLAINT FAILS TO STATE CAUSE OF ACTION ON WHICH RELIEF CAN BE GRANTED

To the Honorable District Court of the United States, for the District of Oregon:

The defendant, Clifford G. Martin, doing business as Martin Music Company, moves the Court to dismiss the above-entitled action because the complaint fails to state a claim or cause of action against the defendant herein named, upon which the relief prayed for can be granted.

The reason why the complaint fails to state a claim against the defendant is because the Office of Price Stabilization has no jurisdiction over the defendant.

The said defendant is not engaged in any business nor does he furnish any goods or render any service that is in contemplation of the Defense Production Act of 1950, as amended. He is exempt under the said act for the reason that the services rendered by him are strictly within the exemptions provided for persons who are engaged in providing entertainment.

That if the injunction prayed for in said complaint is granted, defendant would be forced to do business below cost, and the Office of Price Stabilization is expressly prohibited by the Defense Pro-

duction Act from administering the said act so that any person is required to operate at less than his cost of doing business, or at less than an amount which will return his normal profit earned during the lease period provided in said act.

That the enforcement of the alleged ceiling price by the Office of Price Stabilization would require defendant to operate and do business at less than the cost thereof in violation of the expresed intent of the Defense Production Act of 1950 as amended, and would be a deprivation of property without due process of law.

That the alleged ceiling price issued and attempted to be imposed by the Office of Price Stabilization is improper, illegal and void, in that it is in violation of Section 402, Subsection b2 of the Defense Production Act.

That the operation of a coin operated phonograph is purely a luxury business having no effect whatever on inflation, defense appropriations, the cost of living for workers or other consumers; nor does such operation of such phonographs affect in any way the several purposes or items set forth in Section 401 of said Defense Production Act, which section sets out the intent of Congress as to what was the purpose and intent in the passage of said act.

That the enforcement of said regulation and alleged ceiling price is and would be a violation of that portion of said Section 401 of said Defense

Production Act that provides that "it is the intent of Congress that the authority conferred by this title (Title IV), shall be exercised in accordance with the policies set forth in Section 2 of this Act, and in particular with full consideration and emphasis, so far as practicable, on the maintenance and furtherance of the American System of competitive enterprise, including independent small-business enterprises."

That the imposition and enforcement of this administrative ruling is discriminatory in that all other segments of the music business have been decontrolled and exempted by general overruling orders.

That the imposition and enforcement of said ceiling price regulation is unfair, unjust, unconstitutional and a deprivation of property without due process of law in that such phonographs cannot be operated at a profit at five cents per play and the ruling will therefore render such equipment valueless and unusable.

That the imposition of such an administrative ruling will prevent defendant from earning a sufficient income to pay the skilled mechanics and electricians the wage scale their union contracts provide for.

That the refusal of the Office of Price Stabilization to permit defendant and other phonograph operators from charging ten cents per play, three for twenty-five cents, is arbitrary, unjust, capri-

cious and unfair in that the charge of five cents per play was established over twenty years ago when the phonograph and equipment necessary for their operation cost but a small fraction of their present cost.

That the administrative ruling herein complained of is in violation of the Defense Production Act in that it is not fair or equitable and is not necessary to effectuate purposes of Title IV of said act or any title or part thereof, and said regulation was not accompanied by a statement of the consideration involved in its issuance as required by said act.

That the enforcement of said administrative ruling is and would be in contravention of Section 402, Subsection (g), in that it will operate to compel changes in the business practices and cost practices and methods of the automatic phonograph industry and such regulation is unnecessary to prevent circumvention or evasion of any regulation, order or requirement of Title IV of said Act.

That the enforcement of said administrative ruling and regulation would be and is in direct contravention of Section 402, Subsection (k) of said act, in that the enforcement of said regulation would deny to defendant his customary percentage margins over costs of the service for the base or test period May 24, 1950 to June 24, 1950.

The defendant alleges that the business of operating juke boxes is not a service business and hence

is not covered by the Act. The Defense Production Act of 1950, 50 U.S.C.A. App. Sec. 2102 (b)1 grants the President the right to issue regulations and orders establishing a ceiling or ceilings on the prices and so forth received for the sale or delivery of any "material or service."

"To the extent that the objectives of this title (Sections 2101-2110 of this Appendix) cannot be attained by action under subsection (a), the President may issue regulations and orders establishing a ceiling or ceilings on the price, rental, commission, margin, rate, fee, charge, or allowance paid or received on the sale or deliver or the purchase or receipt, by or to any person, of any material or service, and at the same time shall issue regulations and orders stabilizing wages, salaries, and other compensation in accordance with the provisions of this subsection." 50 U.S.C.A. Appendix Sec. 2102 (b) (1).

The defendant claims that his business is not commonly known as a service business and since the word services is not defined by the Act, it must be assumed that Congress intended its normal meaning. Rodenbough against United States, 25 Fed. 13. There are not many cases which define what a juke box business is. However, in the case of Fox vs. Galloway, 148 Pac. (2d) 922, an Oregon case decided May 9, 1944, the Oregon Supreme Court studied the problem quite thoroughly and decided that a juke box was not a service business. The Statute in this particular case provided that a privilege tax would

be imposed upon coin in the slot mechanical games and devices used to provide amusement as distinguished from coin-operated devices maintained for furnishing service of a public utility or any device which is designed and used strictly as a vendor of merchandise or service and without the elements of chance or prize involved. The Court in its opinion at page 928 stated further:

"Mechanical devices on which the tax is imposed are those which provide entertainment by means of games or music. They do not vend anything that could be considered tangible. It is obvious that there is a substantial difference between providing entertainment and selling merchandise or essential services. And that difference is reasonable ground for the classification made by the legislature."

This same general attitude is taken by the other Courts which have considered this problem. The Courts have uniformly held, we believe, that wherever the question arose, a juke box was not considered a service-vending machine and the operator of the juke box was not considered to be engaged in service business. The other cases which support our view are: Sheppard vs. Giebel, 110 S.W. 2d. 166; Seeburg Piano Company vs. United States, 62 Ct. Cl. 281. We also note that the United States in its Internal Revenue Code, 26 U.S.C.A. 3267 differentiates between the vending machines and gaming or amusement machines under the general theory that vending machines which dispense merchandise or services are not to be taxed under this Section.

"Definition. As used in this Part, the term 'coin-operated amusement and gaming devices' means (1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object and (2) so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premium, merchandise, or tokens. The term does not include bona fide vending machines in which are not incorporated gaming or amusement features. For the purpose of this section, a vending machine operated by means of the insertion of a 1 cent coin, which, when it dispense a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize of a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens shall be classified under clause (1) and not under clause (2)." 26 U.S.C.A. 3267 (b).

We have looked quite diligently for further cases on this subject. However, the question as to whether or not a juke box is a service machine does not seem to have arisen very much. In the cases where it has arisen, however, the Courts and the legislatures have almost uniformly differentiated between service-vending machines and amusement-vending machines. We believe that this is the distinction intended by Congress, since the Defense Production Act, in its price control provisions strikes only at such prices as are considered to be for necessities as distinguished from luxuries. The price control, of course,

is also designed to cut down the cost of the Government in obtaining the goods it needs to carry on its defense and police action functions. However, we cannot see where the price of a juke box will seriously impede the national defense effort nor will it withdraw critical materials from the defense effort. We also doubt that it would increase the cost of living and deprive anyone on a fixed income of any of his or her purchasing power. We also note that by a General Overriding Regulation 14 issued by the Office of Price Stabilization on July 9, 1951 the Government excepted from the provisions of the service regulations, among other people, those engaged in the business of entertainment as well as musicians. We feel that since the Government has decided that entertainers and musicians are exempt from the regulation, that there should be no particular reason for retaining controls over juke box operators. It would seem to put those people who operate a juke box business at a serious disadvantage. However, we again repeat that it is our principal contention that juke boxes are exempted from the operation of the Act as they are not a service.

It is further contended that this defendant has been granted immunity under the provisions of Section 705 (b) of said Act, in that after a claim of the right not to be required to give evidence or information that would be incriminating, said defendant was required to give such evidence and information. In this connection, it is to be noted that the section quoted gives blanket immunity to such cases.

In dealing with a similar provision in the Interstate Commerce Act, the Supreme Court in Brown vs. Walker, 161 U. S. 591 16 S. Ct. 644, 40 Lawyers Ed. 819, stated that the immunity goes to all things covered by the act. Justice Brown, delivering the majority opinion, said:

"The act in question contains no suggestion that it is to be applied only to the Federal courts. It declares broadly that 'no person shall be excused from attending and testifying * * * before the Interstate Commerce Commission * * * on the ground * * * that the testimony * * * required of him may tend to incriminate him, etc. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify,' etc. It is not that he shall not be prosecuted for or on account of any crime concerning which he may testify, which might possibly be urged to apply only to crimes under the Federal law and not to crimes, such as the passing of counterfeit money, etc., which are also cognizable under state laws; but the immunity extends to any transaction, matter, or thing concerning which he may testify, which clearly indicates that the immunity is intended to be general and to be applicable whenever and in whatever court such prosecution may be had."

We believe that the Supreme Court's statement will include anything. However, we note further that Black's Law Dictionary, 3rd Edition, defines a penalty, among other things, as "money recoverable

by virtue of a statute imposing a payment by way of punishment" citing State vs. Franklin, 63 Utah 442; 226 Pac. 674 at 676. In that case the Supreme Court of Utah went to great length to define a penalty and finally quoted 6 Words and Phrases, page 5273 as follows:

"Punishment under a statute by fine or imprisonment, or both, is not a penalty, within the legal definition of that term. A penalty is a sum of money which the law exacts the payment of by way of punishment for doing some act which is prohibited, or omitting to do some act which is required to be done. A fine is a sum of money exacted of a person guilty of a misdemeanor or crime, the amount of which may be fixed by law, or left in the discretion of the court. Imprisonment is not in any legal sense a penalty. Village of Lancaster vs. Richardson (N.Y.) 4 Lans. 136, 139."

This motion is made upon the further ground that on December 1, 1952, by General Overriding Regulation 5, Revision 1, Amendment 10, the Office of Price Stabilization completely removed the business of coin operated amusement machines, including phonographs, from the operation of the Defense Production Act of 1950, as amended. The consideration for said regulation, as stated by the Director of Price Stabilization was that sales of these machines are not significant in the defense program and they do not enter into the cost of living of the American family, and that price control over this industry was extremely burdensome and did not affect the

price control program, and the removal therefrom would not enter into the cost of living of the American family. Reference is hereby made to said General Overriding Regulation 5, Revision 1, Amendment 10, and by such reference said regulation is incorporated herein the same as though set forth in full.

We therefore believe that defendant's motion to dismiss the complaint should be granted on either of the two grounds: First, that a juke box business is not a service business and hence is not covered by the Act, or that if a juke box business is covered by the Act, this defendant has been granted immunity by the Congressional enactment of a Statute designed to protect citizens against the violation of their rights under the 4th and 5th Amendments to the Constitution.

A memorandum of points and authorities, marked "Exhibit A" is attached hereto, and is made a part of this motion as though set out in full herein.

Wherefore, defendant prays that the court dismiss the complaint, and for such other relief as to the court might seem meet and proper in the premises.

/s/ HARRISON W. CALL,
Attorney for Defendant.

[Endorsed]: Filed January 15, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now Defendant above named and answering plaintiff's Amended Complaint on file herein, admits, denies, and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II, IV, IX and X.

II.

Denies the allegations contained in paragraphs III, V, VI, VII, VIII, XI, XII, and XIII.

III.

As and for a further and separate defense, defendant alleges that at no time mentioned in said complaint, was said plaintiff or any of its officials, servants or agents authorized or empowered by said Defense Production Act of 1950, as amended, or by any Act or statute, to establish a ceiling price for the services rendered by said defendant. Defendant further alleges that plaintiff, through its officials, agents, and servants has failed, neglected, and refused to conform to or abide by the provisions of said Defense Production Act of 1950, as amended, in promulgating its said administrative regulations, which it alleges applies to defendant.

In this connection said defendant further alleges that at no time mentioned in this complaint was said defendant engaged in any business or furnished any goods or rendered any services that are or were

in any way in contemplation of the Defense Production Act of 1950, as amended, and reference is hereby made to said Act, as amended, and by such reference the said Act is hereby pleaded the same as though set forth herein at length. Defendant further alleges that said Act was intended to and did apply only to items of merchandise and services and articles of commerce which are connected with or have an influence upon the National Defense or national security or necessary in the development and maintenance of the military and economic strength of the United States.

Wherefore, defendant prays plaintiff take nothing by its complaint and that said defendant may be awarded his costs of suit herein.

/s/ HARRISON W. CALL,
Attorney for Defendant.

[Endorsed]: Filed February 4, 1954.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter came on for pre-trial conference on the 15th day of May, 1953, before the Honorable Gus J. Solomon, Judge of the above-entitled Court, plaintiff appearing by Willis A. West, Special Assistant United States Attorney for the District of Oregon, and defendant appearing by Harrison W. Call.

Admitted Facts

I.

That this is a civil action brought to recover damages for violation by defendant of Ceiling Price Regulation No. 34 (16 F.R. 4446), as amended, issued pursuant to the Defense Production Act of 1950 (Public Law 69, 82nd Congress, 64 Stat. 798, Public Law 96, 82nd Congress), as amended. Jurisdiction of the suit is vested in this Court by Section 798(b) of the Defense Production Act of 1950, as amended, and also by Section 1345, Title 28, United States Code.

II.

That Section 409(c) of the Defense Production Act of 1950, as amended, provides that if any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings, the person why buys such material or service for use or consumption, other than in the course of trade or business, may within one year from the date of the occurence of the violation, except as provided in the section, bring an action against the seller on account of the overcharge and the seller shall be liable for reasonable attorney's fees and costs plus whichever sum is greater an amount not more than three times the amount of the overcharge or the overcharges upon which the action is based or an amount not less than $25.00 nor more than $50.00 as the Court in its discretion may determine, provided that the amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation was

neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. The section further provides that if the buyer fails to institute an action within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the President may institute such action on behalf of the United States. The section defines overcharge as the amount by which the consideration exceeds the applicable price.

III.

Ceiling Price Regulation No. 34, aforesaid, effective May 16, 1951, was issued by the Director of Price Stablization pursuant to the aforesaid Defense Production Act of 1950, as amended, Executive Order 10161 (15 F.R. 6105) and Economic Stabilization Agency Order No. 2 (16 F.R. 730). That said regulation was in full force and effect at all times from September 3, 1951, to the 1st day of December, 1952.

IV.

That defendant is an individual doing business under the assumed name of Martin Music Company in the State of Oregon and in the State of California, with his principal offices in the City of Grants Pass, in the County of Josephine and the State of Oregon, within the District of Oregon and the juridiction of this Court, and was and is engaged in the furnishing of music by means of coin operated machines to purchasers in said states and district.

V.

That during the base period December 19, 1950, to January 25, 1951, inclusive, the defendant charged the sum of 5c per play to purchasers to whom music was furnished by record playing of the defendant's said coin-operated music machines.

VI.

That during the period September 1, 1951, to May 9, 1952, inclusive, the defendant charged and received from customers playing said coin-operated machines the sum of $25,956.20 in excess of a total charge calculated on the price of 5c per play.

VII.

That the phonographs in question were owned by the defendant and operated in the following manner: each machine was placed in a tavern or other public place of business by the defendant upon an arrangement with the location owner, whereby 50% of the proceeds from the phonograph was paid to the location owner, and the defendant paid all operating expense, except for the electric current to operate the phonograph.

A patron of the location owner, who desired to play the phonograph, would select the record desired, by pressing a button or lever, and inserting the required coin necessary for the number of records the patron desired played. The phonograph would then automatically change and play the desired records. During each month, the defendant, or his employees, would, on certain days, service the

phonograph and collect the money from the phonograph coin box and pay 50% of the proceeds to the location owner.

VIII.

That all of the sales of services involved in this action occurred within one year of the filing of the complaint herein and all of said sales were other than in the course of purchasers' trade or business.

IX.

That none of the sales complained of herein arose because defendant acted upon and in accordance with the written advice and instructions of the President of the United States or any official or employee authorized to act for him, and none of the sales herein involved arose out of the sale of any material or service to any agency of the Government pursuant to the lowest bid made in response to an invitation for competitive bids.

Contentions of Plaintiff

I.

That under said Ceiling Price Regulation 34, defendant's ceiling prices for the sale of such services, the furnishing of music by means of coin operated machines, was the highest price charged for such services during the base period from December 19, 1950, to January 25, 1951, inclusive, to purchasers of the same class, and defendant's ceiling price was fixed by said regulation in the sum of five cents for the playing of each record in such coin operated machines.

II.

That defendant during the period from September 1, 1951, to the 5th day of May, 1952, sold such services at a price of ten cents and three for twenty-five cents for the playing of records in coin operated machines located in various establishments in the States of Oregon and California, and charged and received prices for the same over the lawful ceiling price aforesaid calculated at 5c per play, in the total amount of $25,956.20.

III.

That the defendant violated the aforesaid Ceiling Price Regulation No. 34, and said violation was either willful or the result to failure to take practicable precautions against the occurrence of the violation.

IV.

That plaintiff is entitled to judgment in the sum of $77,868.60.

Contentions of Defendant

I.

That all of the charges exacted by defendant in the period in question resulting in a claimed overcharge of $25,956.20, were not the result of sales of service within the contemplation of the Defense Production Act of 1950, as amended, and Ceiling Price Regulation No. 34.

II.

That the Defense Production Act of 1950, as amended, by its own terms, and the intent of Con-

gress as expressed therein, was not intended to, nor did it apply to a luxury type of business such as the automatic phonograph business.

III.

That if defendant is found liable for any sum for overcharge, said sum should not exceed one-half of the claimed overcharge because defendant received only one-half of total proceeds.

Issues of Law

I.

Are the maximum ceiling prices that may be lawfully charged by the defendant as an owner of coin operated music machines, subject to regulations under the Defense Production Act of 1950 as amended?

II.

Does Ceiling Price Regulation No. 34, fix and establish the maximum lawful ceiling prices that the defendant could charge during the period September 1, 1951, to May 9, 1952, inclusive, for music rendered by coin operated music machines?

Conclusion

This pre-trial order has been formulated after a conference between the attorneys for the respective litigants. There are no issues of law or fact except as embodied in this order and this order supersedes the pleadings as to issues of fact and law. This

order will control the course of the trial and shall not be amended except by consent of the parties and the Court or by the Court to prevent manifest injustice.

Dated at Portland, Oregon, this 8th day of February, 1954.

/s/ GUS J. SOLOMON,
District Judge.

The Foregoing Pre-Trial Order Is Hereby Approved:

/s/ WILLIS A.WEST,
Special Assistant United States Attorney, of Attorneys for Plaintiff.

/s/ HARRISON W. CALL,
Of Attorneys for Defendant.

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause.]

(Copy)

ORAL OPINION

June 30, 1954

I find that the Ceiling Price Regulation No. 34, issued pursuant to the provisions of the Defense Production Act of 1950, as amended, was intended to and did regulate the maximum prices that may be charged by the operators of coin-operated music machines, and that such regulation is valid.

It is admitted that, by reason of the fact that during the base period the charge for playing each record was five cents and that during the period beginning September 1, 1951, to May 9, 1952, the customers playing such machines were required to pay $25,956.20 in excess of the total charge calculated on the price of five cents per play. However, it appears that the defendant only received 50 per cent of the gross income from the operation of such machines and that the owner of the location received the other 50 per cent. In view of that fact, I find that the defendant is liable for only one-half of the amount of the overcharge, or $12,978.10.

In my opinion, this is not a proper case for the imposition of treble damages.

The Government may therefore have a judgment against the defendant for the sum of $12,978.10.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been submitted to the Court for determination without trial or oral argument on an agreed statement of facts contained in the pre-trial order on file herein and briefs filed by counsel for the respective parties; and the Court having considered all the facts and contentions of counsel; and the Court being fully advised in the

premises, makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

The Court finds as follows:

1. That this is a civil action brought to recover damages for violation by defendant of Ceiling Price Regulation No. 34 (16 F.R. 4446), as amended, issued pursuant to the Defense Production Act of 1950 (Public Law 69, 82nd Congress, 64 Stat. 798, Public Law 96, 82nd Congress), as amended. Jurisdiction of the suit is vested in this Court by Section 798(b) of the Defense Production Act of 1950, as amended, and also by Section 1345, Title 28, United States Code.

2. That Section 409(c) of the Defense Production Act of 1950, as amended, provides that if any person selling any material or services violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or service for use or consumption, other than in the course of trade or business, may within one year from the date of the occurrence of the violation, except as provided in the section, bring an action against the seller on account of the overcharge and the seller shall be liable for reasonable attorney's fees and costs plus whichever sum is greater an amount not more than three times the amount of the overcharge or the overcharges upon which the action is based or an amount not less than $25.00 nor more than $50.00 as the Court in its discretion may determine, provided

that the amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. The section further provides that if the buyer fails to institute an action within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the President may institute such action on behalf of the United States. The section defines overcharge as the amount by which the consideration exceeds the applicable price.

3. Ceiling Price Regulation No. 34 aforesaid, effective May 16, 1951, was issued by the Director of Price Stabilization pursuant to the aforesaid Defense Production Act of 1950, as amended, Executive Order 10161 (15 F.R. 6105) and Economic Stabilization Agency Order No. 2 (16 F.R. 730). That said regulation was in full force and effect at all times from September 3, 1951, to the 1st day of December, 1952.

4. That defendant is an individual doing business under the assumed name of Martin Music Company in the State of Oregon and in the State of California, with his principal offices in the City of Grants Pass, in the County of Josephine and the State of Oregon, within the District of Oregon and the jurisdiction of this Court, and was and is engaged in the furnishing of music by means of coin operated machines to purchasers in said state and district.

5. That during the base period December 19, 1950, to January 25, 1951, inclusive, the defendant charged the sum of 5c per play to purchasers to whom music was furnished by record playing of the defendant's said coin-operated music machines.

6. That during the period September 1, 1951, to May 9, 1952, inclusive, the defendant charged and received from customers playing said coin-operated machines the sum of $25,956.20 in excess of a total charge calculated on the price of 5c per play.

7. That the phonographs in question were owned by the defendant and operated in the following manner: each machine was placed in a tavern or other public place of business by the defendant upon an arragement with the location owner, whereby 50% of the proceeds from the phonograph was paid to the location owner, and the defendant paid all operating expense, except for the electric current to operate the phonograph.

A patron of the location owner who desired to play the phonograph, would select the record desired by pressing a button or lever and inserting the required coin necessary for the number of records the patron desired played. The phonograph would then automatically change and play the desired records. During each month, the defendant, or his employees, would, on certain days, service the phonograph and collect the money from the phonograph coin box and pay 50% of the proceeds to the location owner.

8. That all of the sales of services involved in this action occurred within one year of the filing of the complaint herein and all of said sales were other than in the course of purchasers' trade or business.

9. That none of the sales complained of herein arose because defendant acted upon and in accordance with the written advice and instructions of the President of the United States or any official or employee authorized to act for him, and none of the sales herein involved arose out of the sale of any material or service to any agency of the Government pursuant to the lowest bid made in response to an invitation for competitive bids.

Conclusions of Law

From the foregoing facts, the Court concludes:

1. Ceiling Price Regulation No. 34 issued pursuant to the provisions of the Defense Production Act of 1950, as amended, was intended to and did regulate the maximum prices that may be charged by the operators of coin-operated music machines, and that such regulation is valid.

2. Inasmuch as it appears that the defendant only received 50% of the gross income from the operation of such machines and that the owner of the location received the other 50%, the defendant is liable for only ½ of the amount of the overcharge, or $12,978.10.

3. This is not a proper case for the imposition of treble damages.

4. The government is entitled to have a judgment against the defendant for the sum of $12,978.10.

Let judgment be entered accordingly.

Dated at Portland, Oregon, this 10th day of August, 1954.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed August 10, 1954.

In the United States District Court for the District of Oregon

Civil No. 6616

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIFFORD G. MARTIN, d/b/a Martin Music Company,

Defendant.

JUDGMENT

The above-entitled cause having been submited to the Court for determination without trial or oral argument on an agreed statement of facts contained in the pre-trial order on file herein and briefs filed by counsel for the respective parties; and the Court having considered all the facts and contentions of counsel; and the Court being fully advised in the premises and having filed herein its Findings of

Fact and Conclusions of Law and having directed that Judgment be entered in accordance therewith,

Now, therefore, by reason of the law and findings aforesaid,

It Is Hereby Ordered, Adjudged And Decreed that the plaintiff have and recover of and from the defendant the sum of $12,978.10.

Dated at Portland, Oregon, this 10th day of August, 1954.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed and entered August 10, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Clifford G. Martin, d/b/a Martin Music Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 10th day of August, 1954.

/s/ HARRISON W. CALL,

/s/ RANDALL S. JONES,
Of Attorneys for Defendant,
Clifford G. Martin.

JACOB, JONES & BROWN,
Of Counsel.

[Endorsed]: Filed September 13, 1954.

[Title of District Court and Cause.]

ORDER FIXING TIME FOR FILING BOND ON APPEAL

It appearing to the Court that Notice of Appeal from the judgment in the above-entitled matter was filed by the Defendant on the 13th day of September, 1954, pursuant to Rule 73 (a) of the Federal Rules of Civil Procedure, and that the action is not yet docketed with the Court of Appeals, it is therefore

Ordered that the defendant is hereby granted to the 21st day of October, 1954, in which to file with the Clerk of the above-entitled Court his Bond for costs on appeal.

Dated this 11th day of October, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed October 11, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents that the United Pacific Insurance Company, a corporation organized and existing under the laws of the State of Washington, and authorized and empowered under the laws of the State of Oregon, to become surety upon bonds, undertaking, etc., in the State of Oregon, is

held and firmly bound unto United States of America, the plaintiff in the above-entitled action, in the penal sum of Two Hundred Fifty and no/100 ($250.00) Dollars, lawful money of the United States, for the payment of which sum well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Upon Condition, Neverthless, that

Whereas, Clifford G. Martin, d/b/a Martin Music Company, the defendant in the above-entitled action, has appealed or appeals to the United States Court of Appeals for the Ninth Circuit from the judgment made and entered in the said action in the said District Court, in favor of the plaintiff and against the defendant in the said action on the 10th day of August, 1954;

Now, if the said Clifford G. Martin, d/b/a Martin Music Company, shall well and truly pay all costs and disbursements that may be awarded by the said United States Court of Appeals if the appeal is dismissed or the judgment affirmed or modified, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] UNITED PACIFIC INSURANCE COMPANY,

By /s/ EMMA M. KEMP,
Attorney-in-Fact.

[Endorsed]: Filed October 11, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

It appearing to the Court that Notice of Appeal from the judgment in the above-entitled matter was filed by the Defendant on the 13th day of September, 1954, pursuant to Rule 73 (a) of the Rules of Civil Procedure and that the time for filing the record on appeal and docketing the appeal has not expired, it is therefore

Ordered that the time in which the defendant must file the record on appeal and docket the appeal be and the same is hereby extended to the 24th day of November, 1954.

Dated this 11th day of October, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed October 11, 1954.

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK

I, F. L. Buck, Acting Clerk, of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Amended complaint, Motion to dismiss complaint,

Answer to amended complaint, Pre-trial order, Copy of oral opinion of Judge Gus J. Solomon (not filed), Findings of fact and conclusions of law, Judgment, Notice of appeal, Order fixing time for filing bond on appeal, Bond for costs on appeal, Order extending time for filing record on appeal, etc., Designation of record, and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 6616, in which Clifford G. Martin, d/b/a/ Martin Music Company is the defendant and appellant and United States of America is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, $5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 16th day of November, 1954.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14581. United States Court of Appeals for the Ninth Circuit. Clifford G. Martin, Doing Business as Martin Music Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed: November 18, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14581

CLIFFORD G. MARTIN, d/b/a Martin Music Company,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

The above-named Appellant intends to rely on the following points on his appeal to the United States Court of Appeals for the Ninth Circuit, to wit.

1. The Trial Court erred in deciding and finding (Conclusion of Law I) that Ceiling Price Regulation No. 34 issued pursuant to the provision of the Defense Production Act of 1950, as amended, was intended to and did regulate the maximum price that may be charged by operators of coin-operated music machines, and in deciding and finding that such regulation was valid.

2. The United States of America, its officials, agents and servants were not authorized by the Defense Production Act of 1950, as amended, or by any act or statute, to establish a ceiling price for coin-operated music machines.

3. The United States of America, through its officials, agents and servants failed, neglected and

refused to conform to or abide by the Defense Production Act of 1950, as amended, in promulgating its regulations, and particularly Ceiling Price Regulation 34, insofar as such regulations applied to the price to charged for furnishing music by means of a coin-operated machine.

4. The Defense Production Act of 1950, as amended, by its own terms, and the intent of Congress as expressed therein, was not intended to and did not apply, to a luxury type of business such as the automatic phonograph business.

5. The maximum ceiling prices that could be lawfully charged by the appellant as the owner of coin-operated music machines were not subject to regulations under the Defense Production Act of 1950, as amended.

6. The appellant was not at any time mentioned in the Complaint herein, engaged in any business and did not furnish any goods or render any services that were in any way within the contemplation of the Defense Production Act of 1950, as amended, or of Ceiling Price Regulation 34.

7. The charges exacted by appellant in the period in question which resulted in the claimed overcharge were not the result of sales of goods or services within the contemplation of the Defense Production Act of 1950, as amended, and Ceiling Price Regulation 34.

8. Ceiling Price Regulation 34 did not fix and establish the maximum lawful ceiling prices that appellant could charge during the period September

1, 1951 to May 9, 1952, inclusive, for music rendered by coin-operated machines.

9. Ceiling Price Regulation 34, if it applies and insofar as it applies to the furnishing of music by means of coin-operated machines, is null and void and in violation of the express provisions of the Defense Production Act of 1950, as amended.

10. If the prices to be charged for furnishing of music by means of coin-operated machines were within the contemplation of the Defense Production Act of 1950, as amended, and of Ceiling Price Regulation 34, the said prices and services were exempted from the provisions of the Act and service regulations by General Overriding Order 14, issued by the Office of Price Stabilization on July 9, 1951, excepting fees and charges made by persons engaged in the entertainment business.

11. The appellant was engaged in the entertainment business during the period September 1, 1951, to May 9, 1952, and, therefore, the fees and charges made by him for furnishing music by means of coin-operated machines for the entertainment of patrons of public places were not subject to the provisions of Ceiling Price Regulation 34.

Dated this 24th day of November, 1954.

/s/ RANDALL S. JONES,
Of Attorneys for Appellant.

Duly Verified.

[Endorsed]: Filed November 26, 1954.